3-30-1976

Coppinger Machinery service, and Shelby Mutual of Ohio v. Alan H. Killion, and Workmen's Compensation Board

Appellee's Brief 1976-SC-0070

APPELLEE'S BRIEF

In The

SUPREME COURT OF KENTUCKY

File No. 76-70

COPPINGER MACHINERY SERVICE, and
SHELBY MUTUAL OF OHIO .....APPELLANTS

VS:

ALAN H. KILLION, and
WORKMEN'S COMPENSATION BOARD ..APPELLEES

APPEAL FROM THE BELL CIRCUIT COURT
HONORABLE W. R. KNUCKLES, JUDGE

BRIEF FOR ALAN H. KILLION, APPELLEE

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It is hereby certified that the within brief has been served upon the Honorable W. R. Knuckles, Judge of the 44th Judicial District, Pineville, Kentucky, 40977, and upon Honorable William A. Watson, Watson & Watson, Attorneys for Appellants, 1911½ Cumberland Avenue, Middlesboro, Kentucky, 40965, and William L. Huffman, Director, Workmen's Compensation Board, Department of Labor, Frankfort, Kentucky, 40601, pursuant to RCA 1.250, via U.S. Mail with adequate postage prepaid this 30th day of March, 1976.

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

The statement of the case in the appellants' brief is essentially correct; however, a more detailed explanation of what was involved in the traumatic injury would possibly be of assistance to the Court.

The appellee was working on a fan-tail section of a

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[1] For the sake of continuity and clarity, the writer of this brief is following the designation of the appellants' brief in reference to using B. R. followed by the page number when referring to the Board's record.

continuous miner, which is a piece of augering equipment in the coal industry. The fan-tail section was a semi-circular piece of metal 12 to 14 feet long with two or three layers of one inch or ¾ inch each, which was approximately three inches in thickness. The appellee was in the process of moving the fan-tail section with a crane to which was attached a wire cable with a hook on it wrapped around the fan-tail section. While thus suspended, the appellee was in the process of taking it apart with a carbon arc blower. He had previously lifted this piece of equipment off the floor approximately 14 inches supporting it with the crane and steading the fan-tail section with wooden horses. (It is well to remember at this point that the fan-tail section weighed approximately two tons.) At this point, the appellee was in a bent over kneeling or squatting position; and as the fan-tail section fell from this position, it struck the appellee in the lower part of his back with resulting shock and pain. (B.R. 11, 12, 13, 14 15).

Dr. J. B. LeSage was the first physician to see and examine the appellee on January 5, 1973, for the injury to the appellee's left shoulder and middle back that he had sustained at work. Dr. LeSage stated that this was a type of traumatic experience that was known to him to cause the type of injury that he had observed in the appellee. He further stated that the x-rays showed a compression fracture of a vertebra which was the first lumbar and a dislocation of the left shoulder with a small fracture. Dr. LeSage was the treating physician for the appellee at the time he was admitted to the Appalachian Regional Hospital. (B. R. 44).

Dr. LeSage performed an operation under general anesthesia to reduce the appellee's dislocated shoulder. After reducing the fracture, the appellee was kept in bed; and his measurements were taken for a Taylor brace made especially for fractures of upper vertebra. He was fitted with the Taylor brace on January 12, 1973, by the physical therapy department. The purpose of the brace was to restrict motion of the spine in the area of injury. (B. R. 45).

Dr. LeSage further stated that he would ask the consultation of an orthopedic surgeon before he would pass the appellee for any difficult work. He did not determine the percentage of the appellee's disability but referred him to Dr. Loyal K. Wilson, an orthopedic surgeon. (B. R. 46).

Dr. Loyal K. Wilson saw the appellee on July 17, 1973, at the request of Dr. J. B. LeSage. He testified that the x-rays showed the appellee had a compression fracture of the first lumbar, the rest of the vertebra was more or less negative at T-12 and L-1, and, in addition, there was a dislocation of the left shoulder which was reduced. (B. R. 37, 38).

Dr. Wilson was asked whether or not he would pass the appellee if he were examining him for an employer in the type of work which required heavy lifting, working with heavy materials, metal and so forth, and his answer was:

> "Well, oftentimes any history of a back injury will preclude occupations in certain industries." (B. R. 39).

Dr. Wilson stated that this was known to him and others who practice his profession to be a pretty general rule

anywhere dexterity and ability to lift was concerned in employment. He further stated that those employers and others who carry workmen's compensation insurance prefer not to take these people on because, in their opinions, they are assuming some type of risk. (B. R. 39).

Dr. Wilson said that he had reached the conclusion that the appellee had a 25% functional disability which was permanent. (B. R. 40).

Dr. Meredith J. Evans saw the appellee on March 8, 1974, at the request of the appellants' attorney for the purpose of evaluation only. Dr. Evans stated that when he examined the appellee's back he found him to have a prominence over the level of the first lumbar vertebra with local tenderness in this area to deep pressure with the thumb and that he had good range of motion in his spine. Neurologically, the examination was essentially negative. He found the appellee to have ten degrees of limitation of lateral rotation or abduction in his left shoulder. Dr. Evans attributed the prominence of the appellee's back to a change in curvature of the vertebra at L-1 from front to back, which could be caused by a wedging type injury to that vertebra. He also stated that the vertebra did contain the cerebral spinal canal. It was Dr. Evans' opinion that the plaintiff suffered a 10% to 15% functional disability. (B. R. 55, 56, 57, 58, 59).

In reference to whether people were being employed with previous back injuries, Dr. Evans was asked if employers were not a little leary of taking on a back problem and his response was:

> "I think this is certainly something to be considered." (B. R. 62).

ARGUMENT

THE OPINION AND AWARD OF THE WORKMEN'S COMPENSATION BOARD AND THE OPINION AND JUDGMENT OF THE BELL CIRCUIT COURT ARE SUPPORTED BY COMPETENT PROBATIVE EVIDENCE.

The Court of Appeals has cited *Osborne* v. *Johnson,* Ky., 432 S.W. 2d 800, perhaps more frequently than any other case authority dealing with the questions before the Court at this time, having cited Osborne more than 70 times since the opinion was written. In the circumstances, it would appear to be an accurate guide of the applicable law in the present facts of this claim.

In *Osborne,* supra, the Court was quoting Larson as follows:

"If occupational disability is the basis for compensation and if, as seems clear, it means impairment of earning capacity, it would seem that all that need be determined in a compensation case, as concerns disability, is: To what extent has the injured workman's earning capacity been impaired? And it would seem that this would involve only these determinations: (1) What kind of work normally available on the local labor market was this man capable, by qualifications and training, of performing prior to injury; (2) what were the normal wages in such employment; (3) what kind of work normally available on the local labor market is the man capable of performing since his injury; and (4) what are the normal wages in such employment?

* * * * *

"Under the foregoing concept *medical percentages* are not determinative. The real question is: How much less money can the injured workman command in the labor market? The doctors' testimony should be addressed to the question of what job requirements the injured man is physically capable of performing (taking into consideration his qualifications and training). The board's determiation of the extent to which the man's earning capacity is impaired then should be made on the basis of evidence as to the existence, in the local area or region, of regular employment opportunities for the type of work the medical testimony shows the man is capable of performing, and the prevailing wage rates in such employment.

* * * * * *

"From the foregoing discussion a conclusion would seem to be that if the injured workman for the present time can earn the same wages as before being injured, he is not disabled at all for workmen's compensation purposes. However, we believe that to adopt such a proposition would be to treat earning capacity as being static and perfectly measurable (which of course it is not), and to ignore the attrition from the mere passing of the years. KRS 342.110 requires that consideration be given to the nature of the injury and to the age of the workman. While a workman who has sustained a permanent bodily injury of appreciable proportions may suffer no reduction of immediate earning capacity, it is

likely that his ultimate earning capacity will be reduced either by a shortening of his work life or a reduction of employment opportunities through a combination of age and physical impairment. Accordingly, it is our opinion that in those instances in which the workman has sustained no loss of immediate earning capacity but has incurred a permanent injury of appreciable proportions the Workmen's Compensation Board, under KRS 342.110, can and should make an allowance for some degree of permanent partial disability on the basis of the probability of future impairment of earning capacity as indicated by the nature of the injury, the age of the workman, and other relevant factors.

"We limit the applicability of the allowance just discussed to situations in which there has been no reduction of immediate earning capacity because we think that in those situations where there has been a reduction of immediate earning capacity, as reflected in lower wages, the lower wages themselves may be considered to embody full recognition of the physical impairment.

"We recognize that the interpretation of the workmen's compensation law that we are adopting herein does not give *full* recompense for occupational disability in that it does not give consideration to the fact that the workman's job opportunities may have been reduced in number as a result of his injury. However, the inclusion of this factor would require use of a highly complicated formula by no means accurate in result. The workmen's compensation

law has never approximated the giving of full compensation for the losses attributable to disability. It is perhaps enough to say that, certainly, the approach adopted in this opinion comes closer to fair compensation than one in which the workman gets only an allowance for partial disability even though he can't get a job, or one in which the workman gets an allowance for total disability even though he can get a job.

"We desire to make clear that as concerns determination of the workman's post-injury earning capacity, it is to be based upon *normal* employment conditions. As said by Larson:

'. . . The essence of the test is the probable dependability with which the claimant can sell his services in a competitive labor market, undistorted by such employer or friends, temporary good luck, or the factors as business booms, sympathy of a particular superhuman efforts of the claimant to rise above his crippling handicaps.' Larson's Workmen's Compensation, Vol. 2, Sec. 57.51."

The appellants present this question in their appeal:

"The question arises then, can the Board, under these facts, find as a fact that the man has a functional impairment which effectuates an occupational impairment as that term is defined in the act. Let us look then to the act for the definition of the term disability, which is what the Workmen's Compensation Law is all about. See Section

342.620(9) where it is stated in part, as follows, to-wit:

"'Disability' means, * * * a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives, taking into consideration his age, occupation, education, effect upon employe's general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement. * * * An individual entitled to benefits under permanent-partial disability shall be entitled to either his lost wages due to his injury or body functional disability benefits, whichever is greater.'" (Appellants' brief, pp. 5, 6).

The Board appointed physician, Dr. T. Rothrock Miller, answers the appellants' question in his testimony which reads as follows:

"Q11 You feel that the limitations that he has in his back, the condition that he has experienced in his back would not weaken his back in heavy lifting such as he was doing at the time that he was injured? This type of injury that he's now experienced would not predispose him to new back trauma or injury?

A - It certainly is going to limit his efficiency for heavy, strenuous physical labor; just as I set forth in my report originally." (B. R. 100).

CONCLUSION

The appellee has received a serious injury to his back and has responded to it in a way that shows he is mentally healthy and has attempted to adapt himself to his injury and its limitations. The members of the Board are perhaps more aware than any other group of the fact that a job applicant with a back problem will find it difficult, if not impossible, to find work in heavy industry such as the appellee was employed at the time of his injury.

It is respectfully submitted that the finding and the Opinion and Award of the Workmen's Compensation Board is supported by substantive probative evidence and that the Opinion and Judgment of the Bell Circuit Court should be affirmed.

Respectfully submitted,

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